

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
FRANCIS NORMAN,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHEB No. 81-175

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal from an order partially relinquishing a ground water right, came before the Pollution Control Hearings Board, David Akana (presiding) and Gayle Rothrock, at a formal hearing in Moses Lake on May 10, 1982.

Appellant was represented by his attorney, Richard A. Lemargie; respondent was represented by Robert E. Mack, Assistant Attorney General. The proceedings were electronically recorded.

Having heard the testimony, having examined the exhibits, and having considered the contentions of the parties, the Board makes these

FINDINGS OF FACT

I

Ground Water Certificate No. 719-D was issued on September 8, 1948 with a priority date of 1913 under the provisions of RCW 90.44.090. The certificate authorizes the withdrawal of 300 gallons per minute (GPM), 126 acre-feet, for domestic, stockwater, and irrigation of 28 acres. The well is located 200 feet east and 20 feet north from south quarter corner of Section 23, Township 22 North, Range 27 E.W.M. The place of use is lots 5, 6, 7, 8, and 9 in Block 2 of Plat of Richacres and portions of land within Section 26, Township 22 North, Range 27 E.W.M.

II

The land described in the certificate is located within Farm Unit 41, Block 70, of the Columbia Basin Irrigation Project and has been receiving water from project facilities since the early 1950's.

On two occasions since its first use, project water has been interrupted. On the first occasion, about 1951 or 1952, project water supply was interrupted. On the second occasion, about 1980 or 1981, project water supply was interrupted by mistake.

On other occasions, appellant has supplemented project water with well water under the instant certificate. Appellant is concerned that future project water supplies may be slow in coming or inadequate in amount. He is also concerned that the project facilities are aging and subject to greater likelihood of failure in the future.

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III

There is a ten inch diameter well at the authorized location. The well is presently equipped with a one-half horsepower pump and a 2 inch flow meter. It is authorized to supply domestic, stockwater and irrigation water supply.

An old irrigation pump was found lying on the ground next to the system during the site investigation. The pump was removed in 1970 or so and replaced with the existing system.

The existing system is incapable of exercising the full water right under the certificate. The existing system has been used for domestic, stockwater and supplementary irrigation uses after July 1, 1967. There has been no irrigation use of water for five consecutive years after July 1, 1967, and at least up until 1980.

IV

Appellant has been and is willing to do whatever would be necessary to keep his water right. He would have a larger pump installed and believes that the pump could be installed within 2 days. He could also provide movable distribution lines if necessary.

V

Appellant was notified by respondent on June 11, 1981, that because of nonuse of the irrigation portion of the right, it should be relinquished. Appellant responded, expressing his intent to use irrigation water under the certificate as a standby or reserve water supply. He expressed his understanding that an earlier DOE requirement to install a meter on his well settled the relinquishment

1 issue. He also expressed a willingness to install a larger pump if
2 necessary.

3 VI

4 Based upon its investigation and without further notice or
5 hearings, respondent determined that the right to use public waters
6 for irrigation as described in Ground Water Certificate No. 719-D
7 reverted to the state. Respondent declared the irrigation portion of
8 the certificate relinquished and ordered that a superceding
9 certificate be issued in the amount of 20 gallons per minute, two
10 acre-feet per year, continuously, for domestic and stockwater.
11 Appellant appealed the determination to this Board.

12 VII

13 Any Conclusion of Law which should be deemed a Finding of Fact is
14 hereby adopted as such.

15 From these Findings the Board enters these

16 CONCLUSIONS OF LAW

17 I

18 This matter involves the application of RCW 90.14.140 to avoid the
19 relinquishment of a portion of a water right certificate for nonuse
20 under chapter 90.14 RCW. Procedural and substantive issues under the
21 statute are also raised by appellant. Appellant also raises certain
22 constitutional issues which we do not address for lack of
23 jurisdiction. We do note, however, that statutory schemes that
24 extinguish private mineral rights, as opposed to public water, have
25 been upheld in the U.S. Supreme Court. Texaco, Inc. v. Short,
26 Nos. 80-965 and 80-1018, January 12, 1982.

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER

II

RCW 90.14.130 provides that when it appears that a person has not beneficially used a water right or some portion thereof because of nonuse and the right has or may have reverted to the state because of such nonuse, respondent "shall notify such person to show cause at a hearing before the [respondent] why his right or portion thereof should not be declared relinquished...." The contents of the notice are also provided by statute. Id. Proceedings under this section are "contested cases" within the meaning of chapter 34.04 RCW and are subject to review in accordance with chapter 43.21B RCW. RCW 90.14.200. RCW 43.21B.120 and .240 prohibit the department from holding contested case hearings and establish such function in this Board. See ITT Rayonier v. Hill, 73 Wn.2d 700 (1970). The effect of these statutory provisions is to require the department to make a preliminary determination of relinquishment which is subject to appeal before this Board. At the hearing, the department must show that the water right or some portion of it has or may have reverted to the state because of nonuse. RCW 90.14.130. If that showing is made, the burden then falls upon the appealing party to show sufficient cause for nonuse. RCW 90.14.140. Only after an affirmance of a department's appealed determination does an order of relinquishment become "final." RCW 43.21B.120.

The above-described procedure preserves to an appellant, a right to a hearing before the department's determination becomes final. We find no procedural error.

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER

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III

The evidence is clear and convincing that appellant did not use his water right for irrigation purposes for at least five consecutive years since July 1, 1967. From July 1, 1967, until the present, appellant has used the water right to supplement project water on one occasion. Under the facts and circumstances, the department has met its burden.

The focus of the case then falls on RCW 90.14.140 which provides in part:

Notwithstanding any other provision of this chapter, there shall be no relinquishment of any water right:

.

(2) If such right is used for a standby or reserve water supply to be used in time of drought or other low flow period so long as withdrawal or diversion facilities are maintained in good operation condition for the use of such reserve or standby water supply....

IV

Aside from the exercise of the domestic and stockwater uses, there has been no use of the irrigation right for five consecutive years. The evidence shows that the appellant can arrange to have an irrigation pump installed within a short time period, if necessary. The well is apparently in good condition, and equipment is available to distribute water to the authorized place of use. The "facility" is apparently available and in good operating condition.

That portion of the water right which has not been exercised within the prescribed time period, and which is not exempted under

1 RCW 90.14.140 should be relinquished. The only rights that are not
2 subject to relinquishment are the standby or reserve water use for
3 irrigation, domestic use and stockwater.

4 The result is consistent with the purpose of chapter 90.14 RCW to
5 return to the state any water rights which are no longer exercised.
6 RCW 90.14.010 and .020. The water that appellant has not used over
7 the years should be made available for those who would use it.

8 V

9 Order Docket No. DE 81-591 should be remanded to respondent to
10 provide for relinquishment of the irrigation portion of the water
11 right except for a standby or reserve water supply under such
12 circumstances as respondent may prescribe. In all other respects, the
13 order should be affirmed.

14 VI

15 Any Finding of Fact which should be deemed a Conclusion of Law is
16 hereby adopted as such.


17 From these Conclusions the Board enters this
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ORDER

Order Docket No. DE 81-591 is remanded to provide for a standby or reserve water supply provision. The decision is affirmed in all other respects.

DONE this 3rd day of June, 1982.

POLLUTION CONTROL HEARINGS BOARD


DAVID AKANA, Lawyer Member


GAYLE ROTHROCK, Vice Chairman

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER